

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 EDC 4032

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Parent,

Petitioner,

v.

Buncombe County Schools,

Respondent.

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**FINAL DECISION--  
ORDER OF DISMISSAL**

**THIS MATTER** was assigned to the undersigned Administrative Law Judge by order of the Honorable Julian Mann, III, entered on May 6, 2011. A review of the record revealed that this matter had been scheduled for a prehearing conference via telephone on May 13, 2011 and that Respondent's Objection To The Sufficiency Of The Petition/Motions To Dismiss filed on April 21, 2011 had not been decided. During the teleconference scheduled on May 13, 2011, the Undersigned discussed Respondent's Objection To The Sufficiency Of The Petition/Motions To Dismiss and sought Petitioner's oral response. After reviewing Respondent's Motion, the Petition and all other documents in the file, and arguments made during the teleconference, the Undersigned finds as follows:

**FINDING OF FACTS**

1. Petitioner filed A Petition For A Contested Case Hearing on April 7, 2011, alleging, to wit:

Cause/Claim of Petition: As of: 1-25-11 Buncombe County School's Staff wrote in IEP: [the minor child] is in separate setting, when in reality she is in regular setting.

2. On April 21, 2011, the Respondent filed an "Objection to the Sufficiency of the Petition/Motions to Dismiss." Respondent states that the within Petition is the seventh due process petition filed by Petitioner since 2008 when she appealed an adverse decision after an administrative hearing. One of the issues addressed in the 2008 due process concerned placement. "Prior to the Fourth Circuit Court of Appeals issuing its decision in March 2011, [the minor child] was educated in a regular setting. This setting was a stay-put placement due to the Due Process #1, filed in 2008. Despite the 'stay put' setting, [the minor child's] IEP indicated she was to be educated in a separate setting, which was the primary issue in the first due process. ... Therefore the issue over 'setting' or placement has been adjudicated by this court, the federal district court and the Fourth Circuit Court of Appeals, all of which have held for the Respondent Board."

3. Respondent in its Motion to Dismiss cites that the "claims regarding setting and placement have been adjudicated by the Office of Administrative Hearings, the State Review Officer, federal district court, and the Fourth Circuit Court of Appeals; therefore *res judicata*

bars the Office of Administrative Hearings from rehearing this matter. Furthermore, the Petition lacks clarity and does not demonstrate a viable cause of action under the Individuals with Disabilities Education Act as reauthorized.”

4. “In determining the sufficiency of the complaint the court must accept all of plaintiff’s well-pled material allegations as true and draw all reasonable inferences there from in favor of plaintiffs.” *Graves v. Lowery*, 117 F.3d 723, 726 (3d Cir.1997); *see also Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir.2005). However, under *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), a complaint must be dismissed if the Plaintiff fails to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic* further states, “While a complaint attacked by a motion to dismiss for failure to state a claim upon which relief can be granted does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” A petitioner or plaintiff cannot just state that a violation occurred without providing adequate support for them. *See Stringer v. St. James R-1 School Dist.*, 446 F.3d. 799 (8<sup>th</sup> Cir. 2006) (affirming the trial court ruling that the student and mother appearing *pro se* failed to state a cause of action when the complaint “merely stated that school district ‘violated written notice’ and did not allege any specific facts.”)

5. Petitioner’s claim for relief is legally inadequate as a matter of law and has failed to allege any violation of law or policy.

6. The Office of Administrative Hearings lacks subject matter jurisdiction as the issue of placement or setting has already been adjudicated by this tribunal, federal district court, and the Fourth Circuit Court of Appeals, all of which ruled in favor of Respondent.

### **FINAL DECISION**

Based on the foregoing, the Undersigned allows Respondent’s Motion to Dismiss. Disposition of this case by dismissal in accord with Chapter 3 of Title 26 of the North Carolina Administrative Code, and N.C. GEN. STAT. § 150B-33 and N.C. GEN. STAT. § 1A-1, Rule 12 of the North Carolina Rules of Civil Procedure, as well as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300, is proper and lawful.

It is hereby **ORDERED** that this matter be **DISMISSED with prejudice**.

### **NOTICE**

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina’s Education of Children with Disabilities laws, the parties have appeal rights.

### **Under Federal Law**

Any person aggrieved by the findings and decision of this Final Decision, Order of Dismissal may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the court.

### **Under State Law**

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

**IT IS SO ORDERED.**

This is the 16th day of May, 2011.

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Selina M. Brooks  
Administrative Law Judge

A copy of the foregoing was sent to:

*Parent*  
PETITIONER

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ATTORNEY FOR RESPONDENT

Lynn Smith  
Parent Consultant  
NC Department of Public Instruction  
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This the \_\_\_\_ day of May, 2011.

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